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SEP 22 1998

CONCORD, N.H.

Mr. Charles J. Downing
Construction Engineer
Department of Public Works and Highways
State House Annex
Concord, New Hampshire

Re: Nashua F.U. 326(2), P-2650-H
Claims

Dear Mr. Downing:

This is in response to your letter of November 21, 1956 concerning the percentages retained with respect to Peter Salvucci & Sons, Inc., the prime contractor in Nashua F.U. 326(2), P-2650-H and the claims of Albert J. Cameron and Victor Charpentier.

As you explained and as your file reveals Cameron, as subcontractor, has asserted a claim against the prime contractor with respect to the subcontract; while Charpentier has advised you that he has a claim against Cameron for loan furnished Cameron presumably for use in his undertaking as a subcontractor. You note that the prime contractor has a back charge against Cameron because of the latter's failure fully to perform, leaving the probable amount due Cameron of \$486.35. The only other information concerning the Charpentier claim is that it is in the amount of \$500. Both claims have the protection of the prime contractor's bond.

You state that the Department has retained the sum of \$7,000 against the prime contractor on account of these claims. The prime contractor now asserts that he is entitled to receive this sum forthwith. You ask our views in the circumstances.

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We understand that the funds retained have been retained under the authority of Division 9.00 of Standard Specifications for Road and Bridge Construction, January 1, 1948. Particular reliance was had upon Section 9.02, the pertinent portion of which is quoted:

"No moneys, payable under the contract or any part thereof, except the estimate for the first month or period, shall become due and payable, if the Commissioner so elects, until the Contractor shall satisfy the Commissioner that he has fully settled or paid for all labor performed or furnished, for all equipment hired, including trucks, for all materials used, and for fuels, lubricants, power, tools, hardware and supplies purchased by the Contractor and used in carrying out said contract and for labor and parts furnished upon the order of said Contractor for the repair of equipment used in carrying out said contract, and the Commissioner, if he so elects, may pay any and all such bills, in whole or in part, and deduct the amount or amounts so paid from any monthly or final estimate, excepting the first estimate."

The language set forth just above would appear to vest a broad discretion in the Commissioner in respect to claims against contractors. This is true; but such discretion is not to be deemed to be without limitation. If called upon the Commissioner must be in a position to show, for example, that he has reasonable grounds to believe that the contractor has not satisfied his just obligations. And even greater obligation is imposed if the Commissioner elects to pay "any and all such bills." Such action he takes at his peril; he relies upon the assumption that a given bill is a just one, that its amount is correct, that it is due and payable, and that the contractor has no set-off or counterclaim against the creditor. Concisely, to pay "any and all such bills" is to perform a judicial function without the protection afforded by law to a Judge.

The Legislature in RSA 447:16-18 has provided an appropriate means for the protection of those who deal with contractors on State work. A bond is required of such contractors - the cost of which, parenthetically it may be assumed, affects the

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contract price - assuring the payment of all legitimate contractual obligations. It is not seen that a public officer contracting on behalf of the State has any greater duty to potential creditors of a contractor than to see that the bond is furnished as required by law.

While considering the protection of the creditors of a contractor, sight of the State's obligation to the contractor himself ought not to be lost. Upon completion of the work in the manner specified in the contract he is lawfully entitled to full payment of the consideration stated therein, subject only to such provisions of the contract itself or of the incorporated Standard Specifications as may reasonably apply and indicate otherwise. Withholding of moneys earned is a drastic act. As a measure to protect the interests of the State it is an effective, salutary device; as a means of protecting creditors of the contractor the utmost care should be exercised to avoid an improper imposition upon him. The necessity of withholding for this purpose should be measured against other means of protection afforded, as, specifically the existence and adequacy of the statutory bond, and the general solvency of the contractor.

In the present case a bond was furnished as required by law in an amount entirely sufficient to afford full protection to all who might be interested. In the matter of Cameron your files show that his claim was made with you for the purpose of obtaining the benefits of the bond and with no other remedy in mind. The Charpentier claim makes no reference to the bond but its language clearly suggests an attempt to rely upon the statutory procedure. These claimants have thus been accorded the full protection intended by the Legislature. You have no further duty with respect to them.

Peter Salvucci & Sons, Inc. has made demand upon you for the retained percentage. We understand that the surety has no objection to your making the payment. In the circumstances of this case it is our opinion that you may properly pay over that portion of the retained percentage which is being held on account of the claims herein discussed.

Your entire file is returned.

Very truly yours,

Warren E. Waters
Deputy Attorney General